INDEX

	Page
Opinion below	1
Jurisdiction	1
The question	2
Statement	2
Argument:	
I. The postmaster's bond covers a loss of registered mail	7
II. The regulations bearing on the question whether the postmaster's liability to the United States for loss of registered mail belonging to the United States depends on negligence or is that of an insurer are not clear, but are fairly susceptible of the construction that negligence causing the loss must be shown	8

AUTHORITIES CITED

Cases:	
Gibson v. *United States*, 208 Fed. 534	8
National Surety Co. v. *United States*, 129 Fed. 70	8
United States v. *American Surety Co.*, 155 Fed. 941	8
U. S. Fidelity & Guaranty Co. v. *United States*, 229 Fed. 397	8
U. S. Fidelity & Guaranty Co. v. *United States*, 247 Fed. 16	8
Statutes:	
Rev. Stat., sec. 3846	9
Sec. 240, Judicial Code, as amended by the act of Feb. 13, 1925, c. 229, 43 Stat. 936	2
Miscellaneous:	
Post-Office Department Regulations—	
Sec. 291	10
Sec. 360	14
Sec. 361	13
Sec. 524	16
Sec. 940	9
Postal Guide, 1920, par. 20	15

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 1138

T. H. DEAL AND UNITED STATES FIDELITY & GUARANTY COMPANY of Baltimore, Maryland, Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The case was tried to a jury, and the charge of the District Court is found at page 373 of the Record. The opinion of the Circuit Court of Appeals has not been reported, but appears at page 539 of the Record.

JURISDICTION

The judgment sought to be reviewed was entered by the Circuit Court of Appeals for the Ninth Circuit on February 15, 1926, affirming a judgment of

the United States District Court for the Territory of Alaska entered upon the verdict of the jury on March 3, 1925. The jurisdiction of this Court to issue the writ is found in Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 936.

THE QUESTION

This case presents a controversy respecting the liability of a postmaster and the surety on his bond for loss of the contents of a registered package while in his custody, where the package contained money belonging to the United States, and whether under such circumstances the postmaster is liable as an insurer on the theory that the money constitutes public funds of the United States entrusted to his care, or whether his liability must be founded on negligence, as would be the case if the registered package did not belong to the United States.

STATEMENT

The petitioner, Deal, was the postmaster at Fairbanks, Alaska. On the afternoon of Thursday, September 15, 1921, an officer of the First National Bank of Fairbanks delivered to the register clerk at the Fairbanks post office a package to be registered and mailed to the special disbursing agent of the Alaska Engineering Commission. This package contained $9,900 in currency and $37.65 in silver, which the officers of the bank had inclosed in wrapping paper and placed in a canvas

sack, such as is ordinarily used for shipment of money. The sack was tied with twine and sealed by the officers of the bank. (R. 53.)

The Alaska Engineering Commission was a governmental agency, and the funds under its control were moneys belonging to the United States, and the money in this package represented the proceeds of certain checks cashed by the special disbursing agent of the Commission out of funds belonging to the United States in his possession as a matter of accommodation, and which checks had been sent to the First National Bank by the disbursing agent to be cashed, with instructions to send him the proceeds in money. The money in the registered package became the property of the United States on delivery of the package by the bank to the post office for transmission to the disbursing agent.

The register clerk, Miss Houck, testified she thought the package contained money, but was not sure. The package was mailed on a mail frank without postage, indicating that it was sent on Government account. The register clerk placed it in a basket beside her (R. 55), and then another post-office clerk, Miss Smith, took possession and placed it in another basket about 3.30 p. m., where it remained an hour or so. (R. 62.) Miss Smith placed the sack in a paper jacket or container, around which she tied a string, and in the late afternoon of September 15th placed the package in

a small safe in the post office, and placed the safe on the day combination. (R. 65.) This meant that, without knowledge of the full combination, turning the combination handle two or three points would enable anyone to open the safe. The next morning, September 16th, Miss Smith opened the safe, finding it still on the day combination. (R. 65.) She took the package and in the presence of the postmaster without removing the paper container so as to examine the condition of the sack, placed it in a mail sack, which was locked and sent by rail to Healy, Alaska, to which it was addressed. On arrival at Healy, it was found that the canvas sack which the bank had used in which to ship the money, had been slit at the bottom, the currency extracted, and replaced with a magazine.

There was evidence from which the jury were justified in finding that the currency had been stolen while the package was in the post office at Fairbanks, and the jury did so find, because whatever other inconsistencies there were in the charge of the trial court it consistently charged that no recovery could be had unless the loss occurred in the Fairbanks post office.

Various Post Office Regulations were relied on at the trial respecting the care of property by a postmaster, the failure to comply with which was urged as ground for holding the postmaster and his surety responsible. The charge of the trial

court is somewhat confusing. The trial judge attempted to submit the case to the jury on three different theories.

One theory was that the postmaster could be held liable for the loss of money only if guilty of negligence as the result of which the loss occurred. In charge No. 13 (R. 392) the court charged that unless the jury found—

> the loss was occasioned by his carelessness or negligence by reason of his disregard of the law or regulations * * * your verdict must be for the defendants.

And in charge No. 15 (R. 394) it said that the failure of a postmaster, which produces a loss, to observe the regulations renders him liable for loss of registered matter. In charge No. 16 (R. 395) it dealt again with the case on the basis of negligence.

Another theory on which part of the charge was based was that to hold the postmaster liable it must appear that he violated some regulation respecting the care of the registered package, but that it was not necessary to show that the violation of the regulation was the approximate cause of the loss. Such a theory is reflected in charge No. 21. (R. 398.)

A third theory was that the money in the registered package, being the property of the United States, constituted public funds entrusted to the

postmaster's care, for the loss of which he would be absolutely liable as an insurer, in the same way that he would be liable for loss of funds representing the sale of stamps or money orders. This theory was presented to the jury in charge No. 22. (R. 399.) It must be admitted that the charge of the trial court involves apparent inconsistencies.

There was evidence to justify a finding that proper care had not been used in protecting the package from theft while in the Fairbanks post office, and if the case had been submitted to the jury on the ground that the postmaster would be liable if negligence were shown which caused the loss, the verdict could readily be sustained.

The Circuit Court of Appeals rejected the theory that in order to hold the postmaster liable it must appear that he was guilty of negligence causing the loss, and also rejected the theory that he would be liable absolutely to the insurer on the ground that the moneys constituted public funds in his charge, but accepted the view that if the postmaster failed to comply with the post office regulations respecting the care of the package, and the contents were lost or stolen while in his custody and while he was failing to comply with the regulations, he would be liable without regard to whether the loss was occasioned by or resulted from the failure to comply with the post office regulations.

ARGUMENT

I

THE POSTMASTER'S BOND COVERS A LOSS OF REGISTERED MAIL

The first point which suggests itself is whether the postmaster's bond was intended to cover loss of registered mail, whether or not owned by the United States. The bond runs to the United States as obligee. Its condition was (R. 375)—

> That if the said Thomas H. Deal shall faithfully discharge all duties and trusts imposed on him as postmaster either by law or by the regulations of the Postoffice Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulations made pursuant to law, in connection with the Postal Savings System, then this obligation shall be void.
> * * *

Even though neither the bond nor any statute or regulation provide expressly that the bond shall inure to the benefit of any person sending registered mail, the law seems to be settled that the United States may maintain an action on such a bond to recover for the loss of registered mail matter belonging to private citizens, and in such

an action may recover the full value of the property lost, and not merely the amount for which the United States may be liable, the proceeds of the suit to be turned over to the person suffering the loss.

National Surety Co. v. *United States,* 129 Fed. 70.

United States v. *American Surety Co.,* 155 Fed. 941.

Gibson v. *United States,* 208 Fed. 534.

United States Fidelity & Guaranty Co. v. *United States,* 229 Fed. 397.

United States Fidelity & Guaranty Co. v. *United States,* 247 Fed. 16.

If a suit may be maintained by the United States on such a bond to recover the value of loss of registered mail belonging to a citizen, there seems to be no reason why the United States may not maintain a suit on the bond for its own benefit where it happens to be the owner of the contents of a registered mail package.

II

THE REGULATIONS BEARING ON THE QUESTION WHETHER THE POSTMASTER'S LIABILITY TO THE UNITED STATES FOR LOSS OF REGISTERED MAIL BELONGING TO THE UNITED STATES DEPENDS ON NEGLIGENCE OR IS THAT OF AN INSURER, ARE NOT CLEAR, BUT ARE FAIRLY SUSCEPTIBLE OF THE CONSTRUCTION THAT NEGLIGENCE CAUSING THE LOSS MUST BE SHOWN

The feature about this case which has caused difficulty is that the moneys lost were not public

funds entrusted to the postmaster for the conduct of his office or arising through the operation of his office, such as proceeds of stamps or money orders sold, and which he was therefore bound to account for to the United States, but the money came into his hands in the form of a registered package sent through the mails in the ordinary way, by a bank to an officer of the United States.

Section 3846 of the Revised Statutes of the United States provides:

> Postmasters shall keep safely, without loaning, using, depositing in an unauthorized bank, or exchanging for other funds, all the public money collected by them, or which may come into their possession, until it is ordered by the Postmaster General to be transferred or paid out.

Under that section no doubt the postmaster would be absolutely liable for loss of public funds such as are described in it, unless he could obtain relief under some statutes which allow relief to be given to him by administrative officers of the Government on proof that he was not at fault. As said by the Circuit Court of Appeals (R. 544), that statute has no application to this case.

Section 940 of the regulations of the Post Office Department provides (R. 546):

> Postmasters and other postal employees will be held personally responsible by the Post Office Department for the wrong delivery, depredation upon, or loss of any reg-

> istered letter or parcel if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations.

If liability rests on this regulation, it is evident that negligence or disregard of the regulations must be established, and it must also appear that the loss was due to such negligence or violation of regulations.

The other section of the Postal Regulations is Section 291, which is found in the regulations under the head of "Miscellaneous Provisions," and is as follows:

> When a post office has been robbed, the postmaster shall immediately report all the facts to the Chief Inspector and to the post-office inspector in charge of the division in which the post office is located. (See sec. 35.) The report should give, if possible, all the circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of Government property. The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property. If the loss includes the mail key the number should be given. (See sec. 1527.) Full particulars regarding registered mail lost or rifled should be reported. The Chief Inspector shall promptly notify the Assistant Attorney General of every such casualty

> from which a claim for credit under the provisions of section 150 may arise.
>
> 2. All subsequent developments shall be reported to the same officers.
>
> 3. Brief telegraphic report of the robbery of a post office should also be made when practicable to the post-office inspector in charge of the division in which the post office is located (see sec. 35), the telegram to be sent "collect" and indorsed, "Official business, collect Government rate."

That section deals particularly with robbery. The clause—

> The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property—

may refer only to the loss of postal funds and money order funds and other like classes of Government property in his possession, or it may refer as well to registered mail. It is also somewhat ambiguous in not stating whether liability for the loss exists if the failure to exercise due care in the protection of the property did not produce the loss. It may mean that a failure to properly protect the property, followed by a robbery at the time such failure exists or continues, is sufficient to hold the postmaster responsible, although there is no direct proof that the failure to use due care produced the loss. This is a possible view, as the exact circumstances of robberies are rarely known. The Circuit Court of Appeals held that Section

291, relating to robberies, applied to the case; that the clause relating to the responsibility of the postmaster for loss applied to registered mail as well as to Government property entrusted to him in the way of postal and money-order funds, and also held, in substance, that Section 940, relating generally to the loss of registered mail and providing for liability of the postmaster for loss due to his negligence or disregard of the regulations, did not make proof that the negligence caused the loss necessary in the case of robbery dealt with by Section 291; and finally it construed Section 291 to mean that the postmaster should be responsible if he failed to use due care in the protection of the property and if it were stolen while he was failing to use such due care, notwithstanding absence of evidence to show that the loss resulted from the negligence.

The trial court had difficulty in applying its view that the postmaster was absolutely liable for loss of registered money belonging to the United States on the theory that it constituted public funds, and realizing that theory would not be workable, unless at least the postmaster knew that he had public funds in the registered mails, charged the jury that to hold the postmaster liable as an insurer of public funds they must find that he knew that this package contained money belonging to the Government.

The theory that the postmaster is absolutely liable as an insurer for loss of a registered package

containing money belonging to the United States, although only liable for loss of private mail where his negligence causes the loss, must be rejected, as the Circuit Court of Appeals rejected it, and the 22d charge of the trial court applying that view was erroneous. The Circuit Court of Appeals held that this error was without prejudice (R. 549, 550), because it conclusively appeared and was admitted that the postmaster violated the regulations respecting the care of the registered package, and holding, as it did, that mere proof of violation of the regulations respecting the care of the package, without any evidence to connect the violation of regulations with the loss, was sufficient to impose liability on the postmaster, it sustained the judgment of the trial court.

As we have endeavored to point out, there is at least room for argument whether, under Section 940, relating to registered mail and providing for liability for loss due to negligence, and under Section 291, relating generally to robberies, the regulations were intended to do more than hold the postmaster responsible for loss of registered mail or loss resulting from robberies where the postmaster's negligence was the approximate cause of the loss.

The Postal Regulations suggested by the Circuit Court of Appeals to have been violated by the postmaster were the following (R. 542, 543.)

> SEC. 361. (4) Where stamps and funds are kept in iron safes with "combination

> locks," such safes shall be carefully and completely locked at night or when the office is left without occupants. No credit will be allowed for losses from safes fastened only with what is termed a " day lock " or " day combination."
>
> A postmaster upon taking charge of his office shall immediately change the combination on every safe therein; and where at any time a safe is procured, either new or second-hand, he shall immediately change the combination. Failure to make such change shall be considered as *prima facie* evidence of contributory negligence on the part of the postmaster in any case where claim is made for credit for money or other property stolen from such safes which have been opened without resort to violence.

That section starts with the provision—

> Postmasters must exercise all possible care for the protection of the public funds and property in their custody.

Section 361, Postal Laws and Regulations, 1913, which is in Chapter 8, entitled " Care of Public Funds and Property," follows Section 360, which is a copy of Section 3846 of the Revised Statutes, quoted above, requiring the postmaster to safely keep public funds and which plainly does not apply to registered mail. Consequently Section 361, respecting the day combination and the changing of the combination, had no application to the case

of registered mail, unless there be some other regulation requiring registered mail to be kept in such a safe.

Paragraph 20 of the 1920 Postal Guide (R. 294) provides:

> Registered articles known or presumed to contain large values, such as coin, currency, securities, etc., to be made the object of special care, in so far as practicable, both at postoffices and while in transit. Such articles, as far as practicable, should be given proper vault or safe protection, handled under the supervision of responsible supervisory officials or employees, and such receipts should be taken and care exercised in billing and checking as will make it possible to place responsibility in cases of loss or depredation.

That regulation says nothing about combinations of safes, but it does require registered articles presumed to contain large values to be given proper vault or safe protection, and placing a valuable money package in an iron safe on a day combination over night, so that any one of a number of postal employees could open the safe or any one ignorant of the combination could open by merely turning the dial a few points to the right, was not proper safe protection, so that the Circuit Court of Appeals was right in saying that a violation of the regulations had occurred with respect to the care of this registered package.

There was also a violation of Section 524 of the Regulations (R. 543) in allowing one not an employee of the department to have access to mail matter. A man formerly employed in the post-office was allowed to enter it the evening of September 15th to get some mail and to dispatch some in the outgoing sacks.

The jury found that the money was lost in the Fairbanks post office. The record shows conclusively a failure to comply with the regulations respecting the care of the package, and that while the package was so improperly cared for the money was stolen. This seems to narrow the case down to the single question whether, under regulations 291 and 940, a postmaster may be held liable for theft of the contents of a registered package while it is in his custody and not guarded as required by the regulations without any proof that the negligence or failure to obey the regulations caused the loss or brought about the theft.

On the evidence in this case it is obvious that the jury would have been justified in finding that the contents of the package were taken during the nighttime while it was in the safe, and that the failure to throw the full combination on the safe allowed the thief access to the package during the nighttime, and that the loss resulted from a breach of the postal regulations. The jury, however, were not given the case on that theory, and it must be admitted that the theory of the Circuit Court of

Appeals that Section 291 of the postal regulations renders the postmaster liable for the loss on his failure to use due care to protect the property, without any connection being shown between the lack of care and the loss except the fact that the loss occurred during the failure to obey the regulations, raises a debatable question.

The amount involved in this case is only $9,000, but the question respecting the basis for liability of postmasters for the loss of registered mail through theft is one of general importance.

The record is in a jumble, and the treatment of the case by the trial court involved so many inconsistencies that the case is difficult to analyze, but we do not feel justified under the circumstances in opposing the petition for certiorari on the ground that the decision below was plainly correct.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

IRA LLOYD LETTS,
Assistant Attorney General.

J. KENNEDY WHITE,
Senior Attorney.

APRIL, 1926.

O